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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 318

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, A CORPORATION,

Petitioner,

vs.

JAMES E. WADDELL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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Summary of Argument.

On a charge under the F.E.L.A. that a rail-motor car derailed with plaintiff due to a defect in the track or roadbed of defendant at a public highway crossing, a verdict against defendant was rested on conjecture. Secondly, in event of a defect therein, there was no evidence that defendant had actual or constructive knowledge thereof, or a reasonable time to discover and remedy such defect. Such defenses were flatly denied defendant as matters of law.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioner, the Chicago and Eastern Illinois Railroad Company, a corporation, hereinafter called defendant, prays for Writ of Certiorari to review a judgment against it in favor of respondent, James E. Waddell, hereinafter referred to as plaintiff, as more particularly follows:

Summary Statement of Matter Involved.

A review is sought of the judgment of the Seventh Circuit Court of Appeals entered April 25, 1944 (Rec. 89),

which judgment became final June 6, 1944 on the overruling of defendant's petition for rehearing (Rec. 103). The judgment affirmed a judgment of the District Court for the Northern District of Illinois, Eastern Division, entered on a verdict of the jury in favor of plaintiff in the sum of $25,000 (Rec. 67).

The opinion of the Honorable Circuit of Appeals is in the record (Rec. 86-88).

The case for plaintiff was brought under the Federal Employers' Liability Act for personal injuries to plaintiff, a signal maintainer, as sustained in a derailment of a company furnished rail-motor car at a railroad-public highway crossing while on his way to a place for signal work. It was charged defendant, an interstate railroad carrier, permitted dirt, gravel and rocks to be and to remain in the space of about two inches between crossing planks and the rails, where flanges of wheels of cars went as trains and cars proceeded over the crossing, whereby the wheels of plaintiff's motor car came in contact with the said material to derail it (Rec. 2, 3). The acts of negligence charged were the defendant carelessly permitted and allowed dirt, gravel and rocks to become embedded in the space, failed to remove same, and failed to warn and inform plaintiff of the presence of said dirt, gravel and rocks between the rails and the planking on the crossing (Rec. 4).

Defendant traversed all material allegations of negligence, denied the acts of negligence charged and notice and the issues were thus presented (Rec. 5, 6).

The pathway of the wheel rim, or flange, properly, is about one inch below the ball (top) of the rail, and called flangeway (Rec. 17).

A cut of the general type of plaintiff's rail motor car, minus windshield, appears at page 12 of the Record. It weighed about 380 pounds (Rec. 11); with the windshield it

was about 5 feet high overall, with the driver on a flat top seat about 3 feet up from the wheel base (Rec. 12), with flanged wheels for railroad tracks, and hand rails extending front and rear to lift the car on and off the track (Rec. 12).

The railcar was in good working order on the day of the accident (Rec. 10).

The accident happened May 4, 1942 (Rec. 13), about 8:30 in the morning (Rec. 36).

The crossing in question was a plank crossing on the county line of Shelby and Effingham counties, Illinois, on the Chicago-Evansville route of defendant (Rec. 9, 13). Photographs of the tracks, roadbed and crossing appear at pages 27, 28 of the Record. The highway was wash gravel over a dirt road (Rec. 13), with crossing high on a little incline (Rec. 13).

Plaintiff did not say that the flanges of his car wheels struck any rock or other material in the crossing flangeway. He said only that the right front wheel of his rail car rose up on the crossing, the vehicle turned sideways, and plaintiff with it, slid and creeped down the rails (Rec. 14, 15). It went about fifty or sixty feet from the crossing, where it stopped, locked cross-wise on the rails (Rec. 25). It dragged plaintiff past a switch point, which cut his left foot so severely (Rec. 15) that it had to be amputated (Rec. 16).

Plaintiff's rail car came out of a mishap at the crossing with its right front wheel (stub axle) snapped off (Rec. 32, 41), its protruding hand rails broken (Rec. 12, 41) and windshield broken (Rec. 41).

Four witnesses from the countryside testified for plaintiff. Each of them observed the crossing after the accident and estimated dirt, gravel or other material in the flangeway as follows: Frank Musser, inch or

inch and a quarter from the top of the east (right hand) rail (Rec. 32); his wife, Jennie Musser about an inch from the top of the rail (Rec. 33); their son, Earl Musser, a fill of dirt and stones as high as flanges on railroad trains mashed it down (Rec. 35); and Roy Slifer said the flangeway was pretty well packed low-down and the packing came to about an inch and a half from the top of the rail (Rec. 26).

Plaintiff said the flange on his car wheels was about an inch deep, same for locomotives and box cars (Rec. 17).

There was no indicia of contact between dirt, gravel or rock and car wheel flanges at the crossing. On this, the only witness, the local township commissioner of highways, C. W. Turner, looked at the crossing after the accident, in the afternoon, and he said there were no gravel grindings or stone dust at the crossing (Rec. 38).

Earlier in the morning than plaintiff, regular rail traffic went over the crossing in ordinary course: Train 124, a five car passenger went north, and Train 123, another five car passenger train went south, over the crossing (Rec. 38, 39). The section crew of three men on a rail motor car went north over the crossing just ahead of plaintiff (Rec. 46) and crew members said the flangeway was clear and their wheel flanges touched nothing in the crossing flangeway (Rec. 46-49). Plaintiff said he crossed the crossing for sixteen or seventeen years in his work, an average of twice weekly, and that he was wholly familiar with the road and crossing (Rec. 20).

There was no previous complaint on the crossing condition from him.

Plaintiff said that lots of times he had seen the section men clean out crossings on his way; that dirt, highway chaff and ballast would pack like concrete in them (Rec. 14); and his other witnesses from the neighborhood also said

they had seen section men clean out this crossing at various times (Rec. 26, 32, 33, 35), with one of them, Earl Musser, stating the crossing was cleaned out the last time he saw it, about three weeks before the accident (Rec. 35).

There was nothing offered to indicate that the crossing was one to fill up rapidly, or otherwise acquire dirt, gravel or rocks in the flangeway.

Plaintiff said there was an automobile (Miss Ponsler) crossing the crossing from the east (right) at about the same time as himself (Rec. 14). He said he saw her approach the crossing and she did not stop (Rec. 14); that he went across the crossing first (Rec. 14); and after she crossed the tracks, she stopped her automobile and walked up the track to where he was (Rec. 21, 22).

A secondary line of testimony was developed by plaintiff that three of his witnesses looked at the Ponsler automobile after the accident and there were no marks on it: Roy Slifer (Rec. 25). Plaintiff's witness Jennie Musser said there was no repairs to it, only where the dirt was scraped off when the automobile hit a bank in the road (Rec. 34). Earl Musser said he heard a motor car coming down the track and then a crash and he went down to the crossing (Rec. 35). That he saw the automobile after the accident and there was no damage done to it, except that the radius rod between the front wheels, axle high, was bent (Rec. 35).

Basis of Jurisdiction to Review Judgment.

Statute.

"Every common carrier by railroad while engaged in commerce between any of the several states or Territories * * * shall be liable in damages to any

person suffering injury while he is employed * * * for such injury * * * or by reason of any defect or insufficiency, due to its negligence, in its * * * track, roadbed * * * or other equipment" (45 USCA sec. 51, Act of April 22, 1908, as amended August 11, 1939).

Under the Federal Employers' Liability Act:

1. Where there is no evidence to support a recovery for plaintiff, the corollary: denial of a directed verdict for defendant-employer is a Federal right reviewable by the Court.

2. Even after proof of a defect in an employer's tracks or roadbed, the presumption prevails that defendant was not aware of it, and defendant must be shown to have had notice of the defect for a sufficient period of time before the accident to remove the same, which is a Federal question.

3. Without a showing of prior notice, neglect to warn an employee on a rail motor car of a rock in a flangeway of a railroad-public highway crossing is neither negligence, nor a defect in employers' tracks or roadbed due to its negligence, within meaning of the terms, which are Federal questions.

Questions Presented.

On a motion to direct a verdict at close of all evidence (Rec. 68), under the Federal Employers' Liability Act:

1. May a verdict and judgment for plaintiff rest on surmise?

2. Where negligence is predicated on the presence of a rock in the flangeway of a railroad crossing over a public, graveled highway, is actual or constructive notice of the object a condition to liability of railroad-employer for its presence or non-removal, or neglect to warn a rail-motorist employee thereof?

3. What is the meaning of, and relation of, negligence, and defects in track or roadbed, in a railroad-public highway crossing flangeway?

Reasons Relied On For Allowance of Writ.

It is submitted the opinion below furnishes a bad precedent within the Seventh Circuit in particular and in administration of the law in general: It uses a method of surmise and conjecture to arrive at a result. The background of the lower court's opinion unmistakably is that the reversal of the lower court's own opinion in the *Tennant* case (87 L. ed. 332) meant the use of conjecture to arrive at a result. Moreover, the opinion, as a precedent, tends to impair the functions of the trial judge and his duty toward each party in a trial.

1. The opinion of the lower court probably conflicts with an approved interpretation in *St. Louis, I. M. & S. R. Co.*, 187 S. W. (Ark.) 452, 453, aff'd Memoranda 244 U. S. 647 on authority of *Chicago Junction R. Co.* v. *King*, 222 U. S. 222, *Seaboard Air Line Co.* v. *Padgett*, 236 U. S. 668, *Baltimore & O. R. Co.* v. *Whitacre*, 242 U. S. 169); and probably with *Patton* v. *Texas & Pacific R. Co.*, 179 U.S. 658, *Seaboard Air Line* v. *Horton*, 233 U. S. 492, and *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350 (on the common law background of the Act in this particular regard), as well:

> "Under * * * while, under the federal statute, the presumption prevails, even after proof of the defect, that the railway company was not aware of its existence; and, until it is shown the railway company knew, or, in the exercise of ordinary care, should have known, of the defect, it is not charged with that knowledge."

Moreover the opinion probably conflicts with *Nelson* v. *Southern Railway Company*, 246 U. S. 253, in that a pos-

sible rock entry into a public crossing, railroad flangeway would not be an actionable defect in the track or roadbed due to employer's negligence or one for which there was a duty to warn plaintiff rail-motorist.

2. The opinion probably conflicts with *United States* v. *Ross*, 92 U. S. 281, a civil case, on principles of logic and evidence in the law as requiring an open and visible connection between the principal and evidentiary facts and deductions from them, and the law does not permit a decision to be made on remote inferences. With *Atchison, Topeka & Santa Fe Railway Company* v. *Saxon*, 284 U. S. 458, that the inference relied upon may not be used for substantial support, and speculation and conjecture is inadmissible to support a verdict. Also probable conflict with *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, *infra* brief; *Brady* v. *Southern R. Co.*, decided by this Court, December 20, 1943, and in connection with the latter case, *Huff* v. *Illinois Central R. Co.*, 362 Ill. 95 following *Patton* v. *Texas & Pacific R. Co.*, 179 U. S. 658, on the duty to direct verdicts under the Act where speculation is used to support negligence and proximate cause. Also probable conflict with the *Tennant* case from this court, *Tennant* v. *Peoria & Pekin Ry. Co.*, 87 L. ed. 332 cited in the opinion and misconstrued, we think.

3. The opinion conflicts with *Chicago & N. W. Ry. Co.* v. *Struthers*, 52 F. (2d) 88 from the 8th Circuit, in that the latter court does not regard an accumulation of stones and gravel in a flangeway as self-evidently dangerous and requires knowledge that an accumulation might cause a derailment for negligence in not causing its removal. Also to *Chicago & N. W. R. Co.* v. *Payne*, 8 F. (2d) 332 from the same Circuit, to the point that defendant is not an insurer under the Act. And to *O'Mara* v. *Pennsylvania R. Co.*, 95 F. (2d) 762, from the 6th Circuit, on the point that where the place of injury is used by the general public,

the presence of the interfering object is attributable as well to an agency of strangers as to the defendant, to raise a speculative issue rather than one determinable upon reasonable inference from established facts.

Prayer.

Your petitioner respectfully therefore prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals For the Seventh Circuit, directed to the end that cause therein No. 8473, entitled James E. Waddell, *Plaintiff-Appellee* v. *Chicago & Eastern Illinois Railroad Company, a Corporation, Defendant-Appellant*, may be brought up and reviewed on the complete, certified record thereof, and determined by this Honorable Court, as by the statutes of the United States provided, and that the judgment of the said Circuit Court of Appeals for the Seventh Circuit be reversed, and petitioner have other and further relief as to the Court shall seem meet and proper.

And your petitioner will every pray, etc.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, A CORPORATION,
Petitioner.

EDWARD W. RAWLINS,
Counsel for Petitioner.

JAMES F. WRIGHT,
FAY WARREN JOHNSON,
Of Counsel.

PETITIONER'S

BRIEF

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. .....

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, A CORPORATION,

Petitioner,

vs.

JAMES E. WADDELL,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The trial court erred in denying and overruling the motion of the defendant to set aside the verdict of the jury and to enter judgment in its favor in accordance with its motion for a directed verdict made at the close of all the evidence offered on behalf of both plaintiff and defendant (Rec. 68, 71).

A.

There is no evidence that the defendant violated any duty that it owed plaintiff, including a duty to warn him of the presence of dirt, gravel or rocks in the crossing flangeway.

There is no evidence that the defendant knew of the presence of any dirt, gravel or rocks at or in the crossing flangeways or that there had been any such material at the time and place in question for a sufficient period of time before the accident to charge defendant with knowledge thereof.

Atlantic Coast Line R. Co. v. *Temple*, 285 U. S. 143.

Nelson v. *Southern Railway Company*, 246 U. S. 253.

St. Louis, I. M. & S. R. Co. v. *Ingram*, 187 S. W. (Ark.) 452, 453, aff'd 244 U. S. 647.

Patton v. *Texas & Pacific R. Co.*, 179 U. S. 658.

Seaboard Air Line Co. v. *Horton*, 233 U. S. 492.

Bailey v. *Central Vermont R. Co.*, 319 U. S. 350.

Chicago & N. W. R. Co. v. *Struthers*, 52 F. (2d) 88, 8th CCA.

Chicago & N. W. R. Co. v. *Payne*, 8 F. (2d) 332, 8th CCA.

O'Mara v. *Pennsylvania R. Co.*, 95 F. (2d) 332, 6th CCA.

Morey v. *Maine Central R. Co.*, 142 Atl. (Me.) 485.

The opinion reads (Rec. 88): "It appears to be the further contention that if the derailment was caused by the condition of the flangeway space, it must have been on account of rocks recently lodged in the space, of which defendant had no knowledge. Even so, we think this in itself would not relieve the defendant."

Also in the opinion of the lower court it is stated (Rec. 88): "There is ample proof that this flangeway space was

partly filled with dirt, etc". In any event, we submit, this is only a condition, not a cause.

Moreover, the learned lower court assumes on rock entry that a precisely-sized rock only would be moved from the highway into the flangeway, one that would make for contact and collision. A railroad is not required to anticipate and guard against every possible danger. *Morey* v. *Maine Central R. Co.*, 142 Atl. (Me.) 485.

Also, it considers not the moving agency in case of movement of rock, taken for granted. See *Atlantic Coast Line R. Co.* v. *Temple*, 285 U. S. 143, on reversal for lack of evidence tending to show defendant was in any way responsible for the condition which caused a derailment.

B.

There is no evidence in the record tending to sustain the charges of negligence made against the defendant.

A verdict without substantial support in the evidence and resting upon conjecture and speculation cannot be allowed to stand.

United States v. *Ross*, 92 U. S. 281.

Patton v. *Texas & Pacific R. Co.*, 179 U. S. 658.

Atchison, Topeka & Santa Fe R. Co. v. *Saxon*, 284 U. S. 458.

Pennsylvania R. Co. v. *Chamberlain*, 288 U. S. 333.

Dade v. *Boston & Maine R. Co.*, 30 Atl. (2d) (N. H.) 485.

Huff v. *Illinois Central R. Co.*, 362 Ill. 95.

Brady v. *Southern R. Co.*, Sup. Ct. Dec. 20, 1943.

Tennant v. *Peoria & Pekin Ry. Co.*, 87 L. ed 332.

There were no sand or gravel grindings at the crossing for traces of contact (Rec. 38). Compare *Chicago & N. W. R. Co.* v. *Struthers*, 52 F. (2d) 88, 8th CCA.

On this phase of the case too, *Dade* v. *Boston & Maine R. Co.*, 30 Atl. (2d) (N. H.) 485 was submitted by defendant as a persuasive authority for application of the Federal rule under the F.E.L.A. The case is on all fours with the present case. There, also, it was shown that trucks with gravel went over the crossing on the day of the accident. The court said, page 25:

> **"It is plain that the foregoing testimony furnishes no data on which to base a reasonable inference that the section car was derailed because of stones on the rails or in the flangeways. The most that it indicates is the possibility that the accident may have been due to such a cause, and this court has repeatedly held that an issue of fact which depends wholly on conjecture cannot properly be submitted to the jury."**

The same rule is applicable for Illinois under *Huff* v. *Illinois Central R. Co.*, 362 Ill. 95, following *Patton* v. *Texas & Pacific R. Co.*, 179 U. S. 658, in a case under the Act. In this connection, we submit *Brady* v. *Southern R. Co.*, Sup. Ct. Dec. 20, 1943 is decisive for reversal.

In concluding, the lower court gives us a theory, with a "strong suspicion it might have been the case" (Rec. 88) of a collision between plaintiff's motor car and an automobile as the cause of the derailment. Instead of a theory, defendant raised the point that the undisputed physical damage to the rail car, not incident to an upright stay on the rails, wheel, windshield and extended *hand-rails* broken, killed a theory based on inferences of rock interference in

the flangeway. There was physical damage to the automobile, too (Rec. 34, 35).

Also, to keep the record straight, there is no support in the record for the statement in the opinion that plaintiff "expressly denied that his car collided with an automobile." Plaintiff's case here stands as in *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333, 77 L. ed. 819, 824, a case based on inferences fails on proof of undisputed facts inconsistent with such inferences, for the inferences vanish.

Respectfully submitted,

EDWARD W. RAWLINS,
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ANSWER TO PETITION FOR WRIT OF CERTIORARI.

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ANSWER TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, James E. Waddell, for answer to the petition for writ of certiorari says:

The Negligence of the Petitioner.

This was an action to recover damages for personal injury brought under the Federal Employers' Liability Act.

Waddell, the respondent, was employed by the railroad company as a signal maintainer. At the time of the accident he was riding on a small motor car which was being propelled on the railroad tracks across a public crossing.

Respondent claimed that the defendant was negligent in permitting gravel and dirt to accumulate in the flangeway over the public crossing and that the wheels of the motor car struck against rocks and dirt in the flangeway which caused the motor car to derail.

There was an open space between the rail and the planks

of the crossing which extended the entire length of the planks. This space was about five and three-quarters inch deep (Tr. 14). The gravel on the highway was in size from fine gravel up to the size of a hen's egg (Tr. 37). The railroad company itself maintained the crossing (Tr. 38). The witnesses all agree that the gravel of the roadway was knocked about by automobiles and horses that went across the highway and caused the flangeway to fill up with rocks and dirt (Tr. 38).

Several witnesses testified that the dirt and stone that were carried by the cars into the flangeway, filled it up to a point about an inch or inch and a quarter from the top of the rail. The flanges on the wheels of locomotives and freight cars caused it to be packed solid (Tr. 17, 26, 32, 33).

Respondent testified that on Saturday previous to the accident, he had seen loose stone standing in the flangeway about a half inch above the ball of the rail and it was resting on the packed rock in the flangeway. He testified also that immediately before the accident, as he approached the crossing, he saw loose stones standing in the flangeway one-half inch above the top of the rail (Tr. 17).

There was not much danger of locomotives and freight cars being derailed because of their great weight, but there was grave danger of light motor cars being derailed because they were not heavy enough to crush the stones (Tr. 42).

The railroad company appreciated the necessity of keeping the flangeway clean and to that end employed men whose duty it was to remove the loose stones and gravel from the flangeway (Tr. 14, 26, 32, 33 and 35). But these employees of the railroad company failed to perform their duty and permitted the gravel and stones to accumulate in the flangeway (Tr. 33, 35).

While the railroad company had within its power the

ability to produce witnesses as to the last time the flangeway had been cleaned out, no attempt was made by the railroad company to furnish that evidence.

The opinion of the Circuit Court of Appeals accurately sets forth the facts of the case. Petitioner fails to point out in any respect wherein the facts are incorrectly stated.

Lack of Basis for Jurisdiction.

The questions involved in this suit were purely questions of fact which have been resolved by the jury in favor of the plaintiff. No question of law is presented.

The decision is not in conflict with any decision of the Circuit Court of Appeals. It does not involve an important question that has not been decided by the Supreme Court. Nor is it in conflict with applicable decisions of the Supreme Court (Rules of the Supreme Court of the United States, Rule 38-5B.)

At the close of all of the evidence, the petitioner made a motion for a directed verdict in its favor. The motion was overruled. Petitioner argued in the Circuit Court of Appeals that the verdict was not supported by the evidence. The Circuit Court of Appeals found against the petitioner and thereby all questions of fact were finally settle.

The Evidence Supported the Verdict.

The railroad company was in possession of the railroad crossing and while it was on a public street, the railroad company maintained the crossing (Tr. 38). The highway was surfaced with loose gravel and, for a matter of years, prior to the accident, dirt, sand and gravel worked into the flangeway which became packed solid and firm (Tr. 26, 32, 33). The flange on the drive wheels of locomotives packed the dirt, sand and gravel into the flangeway so that it became hard. There was no danger of derailing a loco-

motive because the weight was so great as to crush the gravel. There was great danger however of a light motor car, weighing three or four hundred pounds being derailed because its weight was not sufficient to crush the rock.

The railroad company had notice of this condition for years prior to the accident, it employed men whose duty it was and who did at stated intervals clean out the flangeway.

The railroad company also had notice of the danger of horses and automobiles kicking loose gravel into the flangeway which would rest upon the hard packed base in the flangeway and thereby cause a motor car to be derailed.

The jury necessarily found that the railroad company had notice of this condition, and the trial judge who heard the evidence was satisfied with the verdict.

Inasmuch as the jury found the issues in favor of the respondent, it must be assumed that it decided all controverted questions in his favor. For the purposes of this record, the testimony in favor of the plaintiff must be considered as true and the plaintiff was entitled to such reasonable inferences as may be drawn from the facts.

The railroad company knew the respondent would cross over this particular crossing because they had furnished him the motor car. Notice of the dangerous condition of the crossing was brought home to the railroad company by the lapse of time.

In the case of *Chicago & N. W. Ry. Co.* v. *Struthers*, 52 Fed. (2) 88, certiorari denied, 284 U. S. 662, it appears that the flangeway over a crossing became filled with packed stone and gravel thrown into it by the wheels of vehicles passing on the graveled highway and that a locomotive in passing over the crossing was derailed by coming in contact with the accumulation of stones and gravel. Witnesses testified that the flangeway had been filled in with stones

and gravel for a matter of nine days prior to the happening of the accident. The Court said:

"It cannot be said then that there was no substantial testimony tending to prove these facts: That at the place and time of the derailment which resulted in Curran's death there was an accumulation of gravel and small stones in the flangeways to a level with or nearly to a level with the top of the rails, that such a condition was likely to derail a train, and that it had continued sufficiently long before the derailment that in the exercise of ordinary care the defendant should have discovered and removed it. In short, there was substantial evidence that the defendant was negligent.

"It is earnestly contended by the defendant that there was no substantial evidence that the derailment actually was proximately caused by an accumulation of gravel and small stones. Rather, it is urged, the evidence shows that the derailment probably was caused by a single very hard rock which had been thrown into the flangeway and of whose presence therein the defendant was not shown to have had any notice and on account of which, therefore, the defendant was not negligent. Unfortunately for this contention, while the testimony did tend to show that a particular small stone was a part of the accumulation in the flangeway and that it probably was the immediate cause of the derailment, this stone was not something separable either in its quality or origin from the whole accumulation of small stones and gravel. The small stone referred to was described as about an inch in diameter. Having regard to the dimensions of the flangeway, a stone of such size, except as a part of an accumulation, could not alone have affected a derailment.

"With evidence that the flangeway was filled with gravel and small stones, with evidence that this mass was packed down in the flangeway coming nearly to a level with the top of the rail, with evidence that at the point of accumulation the pilot wheels of the locomotive were seen or otherwise perceived by the locomotive engineer to jump upward, with evidence that after the derailment a groove made by a wheel flange

was seen in this accumulation and that this groove ended where a part of the accumulation, a small stone, split and wedged into the flangeway, was afterward observed, with evidence that such a condition of accumulated stones and gravel could cause derailment, there was certainly enough to support a finding by the jury that the accumulation was the proximate cause of the derailment. With so much to support the finding, it was a jury question whether the accumulation was the proximate cause of the derailment."

In the case of *Christian* v. *Boston & M. R. R.*, 109 Fed. (2) 103, it appeared that a locomotive engineer was killed when the locomotive was derailed because it hit obstructions of stone, dust and gravel washed down onto the crossing. It was held that the defendant's negligence in the maintenance of the track at the crossing was a question of fact for the jury.

The Verdict Does Not Rest on Conjecture.

The petitioner says that the plaintiff's injury may have been caused by a collision between his motor car and a passing automobile. There is no proof that any such collision occurred. In fact the only testimony in the record is to the contrary.

There were but three possible witnesses to the occurrence,—the plaintiff, Roy Slifer, and Miss Ponsler, a school teacher who drove an automobile.

There was no contact between the automobile and the motor car at any time. The plaintiff testified: "I crossed in front of the automobile. When I was in the middle of the highway, she was something like 30 or 40 feet back (Tr. 12)."

Roy Slifer testified: "I didn't see Mr. Waddell and the automobile at the same time; I saw the automobile a little later (Tr. 29)."

Although the railroad company, through its employees, knew of the happening of the accident and went to the scene of the accident for the purpose of investigating the facts (Tr. 39), it made no attempt to take the deposition of Miss Ponsler, nor to produce her as a witness upon the trial. It is safe to say that if she would have claimed any collision with the motor car, the defendant would have produced her testimony.

The only reasonable inference to be drawn from the evidence is that the motor car was derailed because of the gravel in the flangeway. That was one aspect of the case which the jury must have considered and decided adversely to petitioner.

Inasmuch as the petition advances no ground for jurisdiction, we earnestly pray that the petition for writ of certiorari be denied.

Respectfully submitted,

ROYAL W. IRWIN,

Attorney for Respondent.